

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Michael Van Schaik, et al.,	)	No. CV-09-1128-PHX-ROS
Plaintiffs,	)	<b>ORDER</b>
vs.	)	
Target Stores, Inc., a Minnesota	)	
Corporation, et al.,	)	
Defendants.	)	

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Defendants removed this case from the Maricopa County Superior Court based on the alleged diversity of citizenship of the parties. Plaintiffs now move to have the case remanded, arguing that complete diversity does not exist. For the following reasons, the motion will be granted.

**BACKGROUND**

Plaintiffs are the surviving husband and children of Carolyn Van Schaik. According to the complaint, Ms. Van Schaik took medication manufactured by Defendants Ethex Corporation and K-V Pharmaceutical Company. The medication was distributed by Defendant Target Stores, Inc. Defendants Julie Cole and Tina Do-Tringh were the pharmacists at the retail location where Ms. Van Schaik obtained the medication. Plaintiffs filed a seven-count complaint against Defendants.

1 According to the Notice of Removal, all Plaintiffs are citizens of Arizona, Defendant  
 2 Target Stores is a Minnesota corporation, and Defendants Ethex Corporation and K-V  
 3 Pharmaceutical Company have their principal offices in Missouri. Defendants Julie Cole and  
 4 Tina Do-Tringh are citizens of Arizona but Defendants allege these Defendants were  
 5 “fraudulently joined because plaintiffs have failed to state a cause of action against them and  
 6 that failure is clear under applicable law.” (Doc. 1 at 4). Plaintiffs now move for remand,  
 7 arguing that the presence of Defendants Cole and Tringh defeats diversity jurisdiction.

### 8 ANALYSIS

9 Pursuant to 28 U.S.C. § 1332(2), “federal district courts have jurisdiction over suits  
 10 for more than \$75,000 where the citizenship of each plaintiff is different from that of each  
 11 defendant.” *Hunter v. Philip Morris USA*, 2009 WL 3068161, at \*3 (9th Cir. Sept. 28, 2009).  
 12 One exception to the requirement of complete diversity of citizenship “is where a non-diverse  
 13 defendant has been ‘fraudulently joined.’” *Id.* (quoting *Morris v. Princess Cruises, Inc.*, 236  
 14 F.3d 1061, 1067 (9th Cir. 2001)). Fraudulent joinder exists “[i]f the plaintiff fails to state a  
 15 cause of action against a resident defendant, and the failure is obvious according to the  
 16 settled rules of the state.” *Id.* (quoting *Hamilton Materials, Inc. v. Dow Chem. Corp.*, 494  
 17 F.3d 1203, 1206 (9th Cir. 2007)). “[T]here is a general presumption against fraudulent  
 18 joinder” and the burden is on Defendants to prove fraudulent joinder by “clear and  
 19 convincing evidence.” *Hamilton*, 494 F.3d at 1206.

20 The complaint contains two causes of action against Defendants Cole and Tringh:  
 21 negligence and failure to warn.<sup>1</sup> Arizona recognizes that pharmacists owe a duty of  
 22 reasonable care to their customers. *Lasley v. Shrake’s Country Club Pharmacy, Inc.*, 880

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23  
 24 <sup>1</sup> Defendants argue that Plaintiffs agreed to the dismissal of the failure to warn cause  
 25 of action. (Doc. 36 at 3). This is not accurate. Defendants Ethex Corporation and K-V  
 26 Pharmaceutical Company moved to dismiss the implied warranty claim. (Doc. 17).  
 27 Plaintiffs filed a notice of non-opposition. (Doc. 31). That notice makes no mention of the  
 28 failure to warn cause of action. Thus, the failure to warn cause of action remains in place.  
 Defendants’ confusion appears to result from the implied warranty claim being labeled  
 “Count VI” and the failure to warn claim being labeled “Count IV.”


1 P.2d 1129, 1132 (Ariz. Ct. App. 1994). Plaintiffs allege that the conduct by Defendants Cole  
2 and Tringh breached the standard of care established pursuant to that duty by failing to  
3 “properly warn and instruct.” (Doc. 1 at 21). These allegations are sufficient to state of  
4 cause of action under Arizona law. Thus, Defendants have not proven by clear and  
5 convincing evidence that Defendants Cole and Tringh were fraudulently joined. Diversity  
6 jurisdiction does not exist and this case must be remanded.

7 Accordingly,

8 **IT IS ORDERED** the Motion to Remand (Doc. 29) is **GRANTED**. The Clerk shall  
9 remand this matter to Maricopa County Superior Court and close this case.

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11 DATED this 22nd day of October, 2009.

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Roslyn O. Silver  
United States District Judge